Supreme Court, U.S.
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80-1244

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1980

VIRGIL ALESSI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, when a defendant's misunderstanding of the charge to which he pleads guilty is demonstrated in the plea proceedings, his plea may nonetheless be upheld on attack under 28 U.S.C. §2255, in reliance upon an assumption that his attorney explained the charge to him?

2. Whether, when no factual basis for a charge appears in the plea proceedings, the plea may nonetheless be upheld in reliance upon extrinsic, hearsay evidence, more than two years after the plea?

3. Whether, when a defendant enters into a unitary plea-bargain calling for the disposition of two separate indictments by a plea to one count of each indictment, and the plea to one of the indictments is later found to have been entered without understanding of the charge or a factual basis therefor, can the plea to the other charge nonetheless be permitted to stand?

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The Petitioner, Virgil Alessi, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 13, 1980.

OPINION BELOW

The opinion of the court below is reproduced in Appendix B hereto. An earlier, related opinion, is reported at 593 F.2d 476, and is reproduced in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 13, 1980. A timely petition for rehearing

was denied on October 2, 1980. Jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, when a defendant's misunderstanding of the charge to which he pleads guilty is demonstrated in the plea proceedings, his plea may nonetheless be upheld on attack under 28 U.S.C. §2255, in reliance upon an assumption that his attorney explained the charge to him?

2. Whether, when no factual basis for a charge appears in the plea proceedings, the plea may nonetheless be upheld in reliance upon extrinsic, hearsay evidence, more than two years after the plea?

3. Whether, when a defendant enters into a unitary plea-bargain calling for the dispposition of two separate indictments by a plea to one count of each indictment, and the plea to one of the indictments is later found to have been entered without understanding of the charge or a factual basis therefor, can the plea to the other charge nonetheless be permitted to stand?

STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure, Rule 11:

(c) *Advice to defendant.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered . . .

(d) *Insuring that the plea is voluntary.* The court shall not accept a plea of guilty or nolo contendere without first, by ad-

dressing the defendant in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement . . .

(f) *Determining accuracy of plea.* Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) *Record of proceedings.* A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

United States Code, Title 28:

§2255. *Federal custody; remedies on motion attacking sentence*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

STATEMENT OF THE CASE

In 1972, petitioner was charged in two indictments in the Eastern District of New York with conspiracies to distribute

narcotics, from March, 1967 to December, 1971. In October, 1972, those indictments were disposed of by a plea-bargain, under which the indictments would be dismissed in exchange for petitioner's plea to a substituted information and a suspended sentence. He was sentenced to a five year term of probation, which he completed without incident in 1977.

In the meantime, however, petitioner was again indicted, in 1975, in the Eastern District of New York, on eight counts of failing to file returns and income tax evasion for 1968-1971, periods which preceded his plea-bargain. He was also indicted in the Southern District of New York for five substantive narcotics violations during 1970 and 1971, a period of time encompassed by the 1972 plea-bargain.

Petitioner attempted to get both indictments dismissed as violations of his 1972 plea-bargain. Those attempts were unsuccessful. *United States v. Alessi,* 536 F.2d 978 (2d Cir. 1976); *United States v. Alessi,* 544 F.2d 1139 (2d Cir.), *cert. den.* 429 U.S. 960 (1976).

In November, 1976, on the eve of trial, before the petition for a writ of certiorari was even acted upon in the case reported in 544 F.2d, petitioner was told by his lawyer that he had no choice but to plead guilty. Even though she had promised him he would never spend a day in jail (2-514)* she now announced that he was "dead" on both the tax indictment and the narcotics indictment. If he insisted on going to trial in the tax case alone, she told him, he would be convicted and would receive maximum, consecutive sentences (approximately thirty years). This would be in addition to the sentence he would

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*Reference is to Volume 2 of the Joint Appendix below.

receive upon conviction in the narcotics case, which she also told him was a virtual certainty (2-516).

Petitioner arranged a meeting between his attorney and another attorney, where the threats and predictions were substantially repeated (2-532, 247-254). Petitioner was also given a similar message by a third attorney, who related a conversation he had had with petitioner's attorney. He was "a loser" on both cases (2-368). It was essential to plead to the narcotics case in order to avoid certain conviction and a maximum sentence on the tax charge (2-368).

Petitioner then received a phone call from his attorney, who told him it was "all set" and he had to be in court the next day to take the plea (2-541). He did so, pleading guilty, pursuant to a "package" his attorney had worked out, to one count of income tax evasion and one count of narcotics distribution.

During the plea proceedings, the court read the pertinent counts from each indictment, engaged in brief colloquies, which included a warning from the prosecutor, acquiesced in by the court, that there was "no appeal" from a guilty plea (1-63). The pleas were accepted and petitioner received thirteen years imprisonment plus six years special parole on the narcotics count, two years on the tax count, consecutive.

Inasmuch as petitioner has been promised that he would receive no more than ten years on both counts (2-559, 375) he was in shock, and expressed that shock to his attorney immediately after sentence (2-85, 563). A few days later, his lawyer came to see him in the jail and petitioner demanded that she help him "get my plea back." She refused (2-563, 578). He never spoke to or heard from her again (2-565, 84).

A few days after that, someone, apparently his attorney, filed a notice of appeal from the narcotics conviction (but not the

tax conviction), forging petitioner's signature and denominating the appeal *"pro se"* (1-314). The clerk of the Court of Appeals later phoned petitioner's attorney about scheduling the appeal. Petitioner's attorney falsely reported that "Alessi informed us through his present counsel, Jeffrey Hoffman, Esq., that he did not wish to pursue the appeal" (1-316). The clerk contacted Hoffman and was simply told that Hoffman "did not represent Alessi on the appeal" (1-315). A few months later, the appeal was dismissed for lack of prosecution (1-319). Petitioner, who languished in prison, remained unaware of these entire proceedings (2-579, 259, 385).

About a year later, petitioner discovered, through the help of some "jailhouse" lawyers, that he had pled guilty to an offense of which he was innocent. Specifically, he learned that rather than having been convicted of a narcotics offense as a principal, he had been accused of, and technically had admitted to, aiding and abetting one Manfredonia in the latter's distribution of narcotics in the Southern District of New York (2-546). Such was the charge in the bill of particulars (1-37) which had been neither read nor referred to in the plea colloquy.

After getting counsel, petitioner also learned that he could not possibly have been convicted of the tax offense to which he had pled guilty. Although he had admitted to committing income tax evasion for the year 1971, no one had explained to him what that meant. In truth and in fact, he had authorized preparation and filing of his return in March, 1971, before the return was even due (1-108), and a correct tax return had actually been filed in June, 1972 (2-774).

On May 5, 1978, petitioner filed two motions to vacate his convictions pursuant to 28 U.S.C. §2255, alleging *inter alia*, that he had not understood either charge, there was a factual basis

for neither, and his plea was part of a unitary "package deal" whereby the invalidity of either plea voided the other. On July 28, 1978, the judge who had accepted the plea denied the petition without a hearing.

On appeal from that denial, the Court of Appeals for the Second Circuit (Kaufman, Friendly, Smith) agreed that the plea colloquy failed to show understanding of the charge or a factual basis for either plea (A 7-12).* It also decided that the possibility of a factual basis for the tax charge was "rather slim," inasmuch as an essential element of tax evasion, the affirmative act, was nowhere mentioned, either in the indictment or the plea proceeding. The court ordered that conviction vacated. With respect to the narcotics plea, however, the court declined to decide whether vacation of the conviction was required, pending "further factual development" (A 13), *i.e.,* an opportunity to the Government to establish that petitioner had understood the narcotics charge and that there had been a factual basis for the plea. It therefore remanded for a hearing.

The hearing was held in May, 1979. The Government's only witness was the petitioner's former attorney. She testified that she had no recollection of ever having discussed "aiding and abetting" or the bill of particulars with petitioner (2-18, 22, 52-54). She volunteered that to say otherwise would be a "fabrication" (2-18). She repeated that she had "absolutely no recollection . . . of what happened here" (2-22). She did say, however, that she "normally would have explained [to the defendant] what charge he was pleading to," but she was "not sure even if that was done here" (2-22).

She admitted that she had put together a package deal, in-

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*Reference is to the appendix hereto.

volving pleas to both indictments; that she would not have let petitioner plead to one indictment while leaving the other open (2-45); that one of the advantages of the package was to avoid "maximum sentences" which she had expected in the tax case (2-56-58). She acknowledged, however, that she "never had too much of an insight into the tax case" (2-68).

Petitioner called a number of witnesses, including two attorneys who had participated as consultants during pretrial phases. They both denied ever hearing the bill of particulars or "aiding and abetting" discussed (2-260, 297, 378). Even though both had recommended to petitioner that he take the deal — based upon his attorney's claim that both cases were hopeless and he stood to get maximum sentences on the tax case — neither had ever been aware during the pre-plea period that petitioner had been charged with aiding and abetting (2-237, 427). One of these attorneys also swore that petitioner's attorney had told him that the "deal" included concurrent sentences with a "limitation" of ten years (2-369).

Among other witnesses was the Assistant United States Attorney who took the plea. He was asked what he meant during the plea colloquy when he said, "There is no appeal from a guilty verdict" (1-63). He replied that he had meant a guilty *plea*: "You can't appeal the plea itself. You can appeal a motion to appeal [withdraw?] a guilty plea or a 2255 but you can't go up to the court of appeals on a guilty plea. Q. You can't file a notice of appeal and go up? A. Not as far as I know" (2-495).

Petitioner testified, *inter alia,* that no one had ever told him what he had been charged with, what facts were necessary to prove guilt on either charge; he would not have pled guilty to either charge if he had understood either charge; and that his principal reason for pleading guilty to the narcotics charge was,

in reliance upon what the attorneys had told him, to avoid virtually certain maximum, consecutive sentences ("six years on each count") on the tax charges (2-528, 538, 572).

Petitioner also attempted to show that his attorney was mentally unbalanced and incompetent at the time she was representing petitioner. He first attempted to inquire on cross- examination of the former attorney the circumstances and reasons for her quitting law practice in March, 1977, two months after petitioner was sentenced. Questions about where she now lives and what she had been doing since she left the practice were, however, not permitted (2-92-93).[1]

Asked if she was taking any drugs in November, 1976, she invoked the Fifth Amendment (2-95). She volunteered, however, that she was "not taking any drugs on the day when I took the plea here in court." "Q. How about the night before? A. I respectfully declined to answer on the ground that it might incriminate me." The Court: "I get out of this you were taking drugs. All right" (2-96).[2]

Having been blocked on cross-examination, petitioner called as a witness his attorney's former law associate, a criminal law specialist. He testified that during the period when she represented petitioner, his former attorney was "erratic," did "terrible work" (2-158). Her handling of three or four cases during that period "frightened" him (2-161). He gave examples: she promised to file a notice of appeal, then failed to do so (2-167); she made appointments with clients, then closeted herself in

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[1] Petitioner attempted to prove that his attorney was closing down her practice in order to flee with a fugitive client (2-223-226). The district judge refused to hear the offer of proof (2-229).

[2] The judge later opined that the attorney's use of drugs was "quite irrelevant" (2-215).

her room for days, refusing to come out (2-172). She even urged him to violate a State court restraining order, saying "Who would know." (2-177).

Petitioner attempted to elicit the opinion of the witness about whether, during the relevant period, petitioner's attorney had been of unsound mind. The district judge woud not permit it (2-155-158), nor would he permit evidence of her reputation for honesty, veracity, or competence as an attorney (2-163, 164), or the witness' opinion of same (2-187). Nor was the witness permitted to testify to conversations indicative of mental instability (2-183) or of the attorney's regular use of drugs (2-183). He was permitted, however, to state that he would not have entrusted her with a case in November, 1976 (2-187).

Petitioner attempted to elicit evidence that it would have been consistent with his attorney's practices to plead a client guilty without explaining the charges, but the court would not hear it (2-160).

The district judge upheld the narcotics conviction, holding, at one and the same time, that the competence of petitioner's attorney had never been questioned (1-92) (flatly false, see 1-328, 333, 2-160, 113, 226), and that she had been a competent, diligent attorney (1-96). He thus concluded that she had explained the charges to petitioner since "it would have been her practice to explain the nature of the charge . . ." (1-98). The district judge also found a factual basis for the plea, in reliance upon the testimony of a Government witness in a related case, in which petitioner was not present or a party (1-100), and upon a statement allegedly made by petitioner, six weeks after the plea, which was never even introduced into evidence at the hearing (1-101). Essentially, the district judge decided that since petitioner had admittedly been a participant in the nar-

cotics business, he was guilty of whatever he might have been charged with (1-101).[3]

The second panel of the Court of Appeals (Timbers, Mishler, District Judge; Will, District Judge) affirmed. In an opinion by Judge Timbers, the court found sufficient evidence of understanding of the charges based upon nonexistent testimony by petitioner's former attorney that "she normally kept her clients informed of the nature of the charges against them . . ." (B 5). The court also upheld the determination of factual basis, saying that there had been evidence that "appellant had given narcotics to Manfredonia knowing that the latter intended to take the narcotics to the Southern District for disribution" (B 6). The court did not indicate what such evidence was or where it could be found in the record, nor did it indicate how such evidence, if it had existed, would supply the elements of aiding and abetting, *e.g.*, that in fact the principal, Manfredonia, had committed the offense charged.

Judge Will, in a concurring opinion (B 6), pointed out that the court's decision, permitting a plea to stand on the basis of a long after-the-fact reconstruction, was inconsistent with this Court's decision in *McCarthy v. United States,* 394 U.S. 459,

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[3] That petitioner had been involved in narcotics distribution was never in issue. However, as the first panel made clear, it was not enough to establish that fact, which petitioner had admitted at the plea proceeding, for if his narcotics activities were confined to Queens, as he had suggested, his prosecution would have been barred by the previous plea-bargain. It was therefore essential to establish that he committed a crime in the Southern District. See A11. The evidence relied upon by the district judge, however, did not establish that petitioner even knew who Manfredonia was, much less that he "aided and abetted" him. Nor was there any evidence that Manfredonia, the alleged principal, actually committed the crime charged.

468 (1969), and *dictum* in several other cases, *e.g., Santobello v. New York,* 404 U.S. 257, 261 (1971), and was bad law. He added that the lengthy hearing had produced nothing very significant or reliable on petitioner's understanding of the charge or the factual basis therefor (B 7-9). He concurred only because he felt that the previous panel, by remanding the case for a hearing, had implicitly rejected these authorities (B 6).

REASONS FOR GRANTING THE WRIT

A. Questions 1 and 2

1. *The decision is in confict with several decision of this Court*

As Judge Will noted in his concurring opinion, the decision below is in conflict with *McCarthy v. United States,* 394 U.S. 459 (1969), where this Court unanimously declared that when the court accepts a guilty plea, a determination that it is voluntary and knowing is "constitutionally required," *Id.* at 465; and that "[T]here is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charges against him." *Id.* at 470 (emph. in original). "[P]rejudice inheres in a failure to comply with Rule 11." *Id.* at 471. Of similar import are *Santobello v. New York,* 404 U.S. 257, 261 (1971), and *North Carolina v. Alford,* 400 U.S. 25, 37 (1970). *Cf. Boykin v. Alabama,* 395 U.S. 238 (1969).

2. *The decision is in conflict with the law in most Circuits*

Most Circuits have held that whatever may be the case in such matters as special parole, see *United States v. Timmreck,* 441 U.S. 780 (1979), a failure to comply with the requirements of Rule 11 with respect to determining, prior to accepting the

plea, that the defendant understands the charge and its relationship to the facts, and that there is a factual basis for it, voids the plea and makes it amenable to collateral attack. See *e.g. Mack v. United States,* Slip Op., No. 80-1073 (1st Cir., Dec. 3, 1980); *United States v. Dayton,* 604 F.2d 931 (5th Cir. 1979) (*en banc*), *cert. den.* 100 S. Ct. 1080 (1980); *Carreon v. United States,* 578 F.2d 176 (7th Cir. 1978). Indeed, the decision below is not only inconsistent with prior decisions in the Second Circuit, *e.g. Manley v. United States,* 423 F.2d 1241 (2d Cr. 1970) (*en banc*); *Irizarry v. United States,* 508 F.2d 960 (2d Cir. 1974), it produces the anomaly that an accused who pleads guilty in a state court may have his plea vacated on federal habeas corpus if the plea proceedings fail to demonstrate understanding of the charge or a factual basis, see *United States ex rel Dunn v. Casscles,* 494 F.2d 397 (2d Cir. 1974); *United States v. Johnson,* 612 F.2d 305 (7th Cir. 1980), but a federal defendant may not, at least in the Second Circuit. The court below thus created the reverse of the position espoused by Mr. Justice Harlan in *Boykin v. Alabama,* 395 U.S. 238, 244 (1969) (dissenting opinion). Although he had agreed with the Court's decision in *McCarthy v. United States, supra,* Mr. Justice Harlan read *Boykin* as holding that a defendant in a State proceeding has been "denied due process of law" if the record of the plea proceeding is "inadequate to show that [he] intelligently and knowingly pleaded guilty." He was of the opinion that while such a standard was appropriate for a federal accused, it was "bizarre" in federal review of State guilty pleas. He would have been incredulous at the result below.

3. *The petition presents an appropriate opportunity to clarify vital issues concerning the administration of guilty pleas in federal courts and the relationship of Rule* 11 *violations and* 28 *U.S.C.* §2255.

This Court has held that understanding of the charge to which a defendant pleads guilty is " the first and most universally recognized requirement of due process." *Henderson v. Morgan,* 426 U.S. 638, 645 (1976). Moreover, what is required is not understanding or notice in the abstract, but "an understanding of the law in relation to the facts." *McCarthy v. United States, supra,* at 466. Until the decision below, therefore, the lower courts were in seemingly unanimous agreement that the understanding of the charge and its relationship to the facts must be reliably demonstrated in the plea proceeding itself. Thus, a representation by counsel that he or she has fully explained the charges will not suffice. *Irizarry v. United States,* 508 F.2. 960, 965 (2d Cir. 1975); *United States v. Lincecum,* 568 F.2d 1229 (5th Cir. 1978); *Majko v. United States,* 457 F.2d 790 (7th Cir. 1972). See also *McCarthy v. United States, supra,* 394 U.S. at 470. Neither, of course, will testimony of the attorney at a habeas corpus hearing satisfy the fundamental requirements of on-the-record demonstration. *United States v. Johnson,* 612 F.2d 305 (7th Cir. 1980); *United States v. Horsley,* 583 F.2d 670, 674 (n. 6) (3d Cir. 1978). Yet the court below held that an understanding of the charge can be established two and one half years after the plea by a statement of counsel that it was her "normal practice" to explain "what charge he was pleading to," although she volunteered her doubts "even . . . that was done here" (2-22).

If such may suffice to establish understanding of the charge, then Rule 11 in its most essential aspects has become entirely

hortatory. Any lawyer whose performance is cast into doubt by a §2255 petition may be expected to claim *at least* the "normal practice" claimed by petitioner's counsel. Against that will usually be nothing more than the petitioner's plaintive denials. The district judge who originally accepted the plea and found it voluntary and intelligent will, of course, strain to find that he was right in the first place in having made such findings, and will credit defendant's counsel with extraordinary competence, perspicacity, and thoroughness.[4]

Although it may be hoped that other district judges will not, as did the district judge below, ignore or refuse to receive evidence that counsel had no such "normal" practice, or that counsel was anything but "normal," the approach of the court below will be to invite endless and demeaning attacks on counsel. Moreover, as Judge Will noted below, the result, after an evidentiary hearing, may well be, as here, "far from unequivocal" (B8), and whether or not permitted by the Constitution, " is an unsatisfactory way in which to determine if the defendant understood what he was pleading to [and] if there was a factual basis for the plea" (B7).

Petitioner submits that this Court should explicitly affirm what it implied in *McCarthy, Boykin, Santobello,* and *North Carolina v. Alford, supra,* and what it implies in every decision which reviews a conviction after trial, namely, that Due Process carries with it a fundamental notion of the integrity of the record. Just as the prosecution may not shore up a defective trial

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[4] Petitioner's counsel at the guilty plea had demonstrated, in her brief to the Court of Appeals in *United States v. Alessi,* 544 F.2d 1139 (2d Cir.), *cert. den.* 429 U.S. 960 (1976), that *she* did not understand the elements of aiding and abetting. See Brief at pp. 17-18, 29. Thus, even if she had explained them to petitioner, he would not have properly understood them.

record after the trial, it may not supplement a defective plea record. The plea proceeding, like the trial proceeding, must contain the essential elements which are predicate to an adjudication of guilt, *i.e.* understanding of the charge in relation to the facts. No plea proceeding which lacks such a demonstration should suffice to deny a defendant his liberty.

Whether or not the Court thinks it necessary or desirable to decide that Constitutional issue, it should quickly put to rest the wasteful, destructive ideas underlying the decision below. It should declare that an on-the-record determination of understanding of the charge and its relation to the facts is fundamental, and a failure of such a demonstration is "inconsistent with the rudimentary demands of fair procedure." *Hill v. United States,* 386 U.S. 424, 428 (1962).

If the Court does not reverse the decision below, other Circuits may choose to follow it, aided by a misreading of this Court's decision in *United States vs. Timmreck,* 441 U.S. 780 (1979). Ultimately, however, the wisdom in Judge Will's concurring opinion, and in *McCarthy v. United States,* will have to be reaffirmed and the holdings in *Timmreck* confined to its facts. In the meantime, district judges will begin to ignore the core requirements of Rule 11, endless litigation will be spawned, and prisoners will succeed in collateral attacks which would have been unnecessary had *McCarthy* been followed in the first instance.

Petitioner does not question the concern for finality expressed in *Timmreck.* Nor does he question the holding of that case, that a defendant may not collaterally attack his plea merely by asserting a "technical violation" of Rule 11. He does assert, however, with the First Circuit, *Mack v. United States, supra,* the Fifth Circuit, *United States v. Dayton, supra,* and with Judge

Will below, that *Timmreck* has no application to the core concerns of Rule 11, *i.e.*, those designed to demonstrate the voluntariness and intelligence of the plea.

Petitioner respectfully suggests, moreover, that the problems of finality and collateral attack of guilty pleas are fundamentally different than those involving convictions after trial. An accused who is convicted after a trial knows that he has a right to appeal, whether or not he is told, as he almost always is. Indeed, F. R. Cr. Pr. 32(a)(2) requires the trial judge to advise him of this right "in a case which has gone to trial." Defense counsel are normally required to remain in the case, and to perfect an appeal, until and unless relieved by the court. See *United States v. Beverhoudt*, 403 F.2d 141 (2d Cir. 1970). Guilty pleas, under current law and practice, are very different. See 8A Moore's Federal Practice — Cipes Criminal Rules §32.06 (1973). The judge who takes a plea in federal court is not required to advise the accused of the right to appeal. Nor is his counsel required to remain in the case or to file a notice of appeal. Moreover, a recent study of federal district judges found that twenty-six per cent of them not only fail to advise the accused who pleads guilty of the right to appeal, *they advise him that there is no such right*, as both the prosecutor and the judge did to petitioner below. Borman, *The Hidden Right to Direct Appeal from a Federal Plea Conviction*, 64 Cornell L. Rev. 319, 351 (1979). Under such a state of law and practice — and a widespread professional ignorance of the right to appeal from a guilty plea[8]

[8] The prosecutor who took the plea below, who had been the head of the narcotics section of the Southern District United States Attorney's Office, remained ignorant, in mid-1979, of the right to appeal from a guilty plea (2-495). Similarly, although two lawyers spoke to petitioner about "getting his plea back" shortly after he was sentenced, neither ever mentioned an appeal (2-259, 385).

— an assumption that an accused who failed to appeal intelligently waived that right would be absurd. Thus, to close the doors of the court to a defendant who discovers, after the ten day right to appeal has expired, that his plea was defective, is both unjust and irrational, except in purely technical cases like *Timmreck.*

Question number 3

The decision below is in conflict with the law of several circuits and is grievously wrong

The record of the plea proceedings established that the defendant was pleading to each of the two indictments as part of a unitary, package deal. His attorney stated for the court, in her only display of competence, that petitioner was pleading guilty in reliance upon "each and every aspect of this agreement (1-57)." Her attorney admitted below that she told petitioner that he would get a "maximum" sentence on the tax case if he didn't accept the package. Two other attorneys testified that she explained to them that it was essential to plead to the narcotics case in order to avoid a maximum sentence in the tax case (2-251, 368). Petitioner testified that that is why he accepted the "package." (2-520).

The court below, however, found, in its first panel opinion, that the tax plea was void. The indictment did not charge the elements of tax evasion, there was no factual basis for the plea, and the conviction "flies in the face of" *Spies v. United States,* 317 U.S. 492 (1943) (A8). Manifestly, therefore, petitioner's plea was a nullity, and the court so held.

Inasmuch as petitioner made one plea-bargain, one decision to plead to both indictments, that decision cannot be part volun-

tary, part involuntary; part intelligent, part unintelligent. It was one decision, one bargain. Moreover, as the record indisputably establishes, the only reason why petitioner pled guilty to the narcotics charge was to avoid a threatened "maximum" sentence on a tax charge of which, it now appears, he was entirely innocent.

Even if petitioner had understood the narcotics charge and its relationship to the facts, and even if he had believed in his guilt of the charge based upon an intelligent understanding, he would still have had a right to a trial. He was deprived of that right by an unlawful, defective tax indictment; grossly and indisputably erroneous advice of counsel. His decision cannot possibly be voluntary. Moreover, his plea was obtained by a prosecutorial threat "to do what the law will not permit," *Lassiter v. Turner,* 423 F.2d 897 (4th Cir. 1970), here, trying and convicting him on a tax charge which had no basis in the indictment, in the law, or in the facts.

Cases in other circuits are virtually unanimous in vacating pleas to more than one charge whenever the plea is defective as to one charge only, for the obvious reason that there is merely one, unitary decision to plead guilty, which cannot be artificially carved up into two or more decisions. *Gilbert v. United States,* 466 F.2d 533 (5th Cir. 1972); *United States v. Marzgliano,* 588 F.2d 395 (3d Cir. 1978); *Manley v. United States,* 588 F.2d 79 (4th Cir. 1978); *Hammond v. United States,* 528 F.2d 14 (4th Cir. 1975). In holding otherwise, the court below invited pernicious, absurdly unjust results. A defendant who pleads guilty to two or more charges but who later discovers that one of the pleas was a nullity cannot challenge it in any meaningful way, for he will be saddled with his plea to the other charges. The prosecution can have the best of two inconsistent worlds, as

here. It can put the defendant in prison for thirteen years on the narcotics charge, and hold against him and threaten to try him on the tax charges should he challenge the plea. *Cf. Blackledge v. Perry,* 417 U.S. 21 (1974).

At no time in these lengthy proceedings has the Government or any judge suggested a remotely plausible justification for the result below.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

STEVEN DUKE
127 Wall Street
New Haven, Connecticut
Counsel for Petitioner

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 520, 574—August Term, 1978.

(Argued January 11, 1979 Decided March 7, 1979.)

Docket Nos. 78-2128, 78-2129

VIRGIL ALESSI,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

KAUFMAN, *Chief Judge,*
and FRIENDLY and SMITH, *Circuit Judges.*

Appeals from orders of the District Court for the Southern District of New York, Dudley B. Bonsal, *Judge,* denying motions under 28 U.S.C. § 2255 and to amend judgment and relieve from judgment with respect to appellant's convictions on pleas of guilty to one count of violating the federal narcotics laws and one count of evading federal income taxes, and motion to reinstate a direct appeal from such convictions. The motion to reinstate the direct appeal is denied. On the appeal in the § 2255 proceeding, so much of the order as denied the

A2.

petition to vacate the conviction on the income tax count is reversed with instructions to set the conviction aside and allow repleading; so much of the order as denied the petition to vacate the conviction on the narcotics count is reversed, with instructions to conduct an evidentiary hearing.

STEPHEN F. MARKSTEIN, Esq., New York, N.Y., Assistant United States Attorney (Robert B. Fiske, Jr., Esq., United States Attorney for the Southern District of New York, Howard W. Goldstein, Esq., Assistant United States Attorney, of Counsel), *for Respondent-Appellee.*

STEVEN B. DUKE, Esq., New Haven, Conn., *for Petitioner-Appellant.*

PER CURIAM:

This is the fourth occasion on which this court has had to deal with two indictments of appellant Virgil Alessi. In one of these indictments, filed in the District Court for the Southern District of New York on August 4, 1975, Alessi and thirteen others were charged in 23 counts with violations of the federal narcotics laws, 21 U.S.C. §§ 173 and 174, and 18 U.S.C. § 2, and 21 U.S.C. §§ 812, 841 (a)(1) and 841(b)(1)(A) and 18 U.S.C. § 2. In the other, filed in the District Court for the Eastern District of New York on April 14, 1975, Alessi was charged in eight counts with various tax offenses in violation of 26 U.S.C. §§ 7201 and 7203. After complicated proceedings revolving around Alessi's unsuccessful contentions that both

indictments violated the terms of a plea bargain with the Strike Force in the Eastern District of New York in connection with a 1972 narcotics indictment, see *United States v. Alessi*, 536 F.2d 978 (2 Cir. 1976) [E.D.N.Y. tax indictment]; *United States v. Alessi*, 544 F.2d 1139 (2 Cir.), *cert. denied* 429 U.S. 960 (1976) [S.D.N.Y. narcotics indictment], and an agreed transfer of the Eastern District tax indictment to the Southern District, Alessi, represented by Nancy Rosner, an experienced and resourceful attorney who had long been acting for him in these proceedings, on November 12, 1976, withdrew his prior not guilty plea on each indictment and pleaded guilty to one count in satisfaction of all charges in that indictment. The two counts were Count XVI of the narcotics indictment—which charged that Alessi had aided and abetted the distribution and possession with intent to distribute of one-quarter of a kilogram of heroin, and Count Eight of the tax indictment which charged that he had committed the felony defined in 26 U.S.C. § 7201 in that during 1971 he had received taxable income of $37,221.66 on which he owed a tax of $9,036.12; that he was required to file an income tax return and pay the tax on or before April 15, 1972; and that he willfully and knowingly attempted to evade and defeat the tax by failing to make the return and pay the tax "and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income." On January 5, 1977, Alessi was sentenced to 13 years in prison followed by 6 years special parole on the narcotics count and a consecutive term of 2 years in prison on the tax count.

In the spring of 1978 Alessi moved under 28 U.S.C. § 2255 to vacate both convictions on the ground of inadequacy of the proceedings in which the guilty pleas were

taken. The court denied the motions without an evidentiary hearing in an opinion rendered on July 28, 1978. Thereafter, on September 18, 1978, Alessi made a motion, pursuant to F.R.Civ.P. 59(a) and (e) and 60(b), to amend the judgment and for relief therefrom, which, as the Government says, "was in essence a request that the District Court reconsider its denial of the Section 2255 motions." The court denied this on the following day. On September 26, 1978 Alessi filed notices of appeals from both orders of denial.

Shortly before filing his brief and appendix on the appeals, Alessi, on November 17, 1978, moved this court to reinstate a direct appeal from the convictions, which had been taken on his behalf by Ms. Rosner on January 17, 1977, but had been dismissed by the Clerk on May 11, 1977, for failure to comply with a scheduling order. Chief Judge Kaufman denied the motion without prejudice to renewal at the argument of the appeal in the § 2255 proceeding.

The circumstances claimed to warrant reinstatement of the appeal are as follows: Alessi informed Ms. Rosner in January or early February 1977 of his desire to have his guilty pleas nullified. Allegedly she declined to assist him and did not notify him that she had already filed a notice of appeal. A scheduling order sent to Ms. Rosner's office set March 2, 1977 as the date for filing the record and March 21, 1977 as the date for filing the brief and appendix. Ms. Rosner wrote the Clerk that "Mr. Alessi informed us through his present counsel, Jeffrey Hoffman, Esq., that he did not wish to pursue his appeal."[1] Alessi claims to have been unaware of this letter. When the Clerk's office called Mr. Hoffman for confirmation,

1 Mr. Hoffman was representing Alessi on a motion to reduce sentence under F.R.Cr.P. 35.

the answer was that Hoffman was not representing Alessi on the appeal. Alessi claims that he also was not informed of this. He argues that the failure to prosecute the appeal was due to neglect by Ms. Rosner and Mr. Hoffman to keep him informed.

We find it exceedingly hard to believe that Alessi, who has benefited from most vigorous representation in his brushes with the law before and since the 1975 indictments, was as bereft of "the guiding hand of counsel," *Powell v. Alabama*, 287 U.S. 45, 69 (1932), as he claims to have been with respect to the appeal in the spring of 1977. Certainly he has had most diligent counsel since the filing of the § 2255 motion in the spring of 1978. Yet it was not until the fall of that year, after the district court had denied the § 2255 motion and its sequel, that counsel moved to reinstate the direct appeal, obviously for the purpose of gaining the more liberal standard of review prevailing in this circuit on direct appeals from that on collateral attack upon convictions after guilty pleas. See *United States v. Del Vecchio*, 556 F.2d 106 (1977). To permit reinstatement of the appeal nearly three years after the convictions would create the very evils which the *Del Vecchio* distinction aimed to prevent, see 556 F.2d at 109. One reason for allowing collateral attack is to afford a limited possibility of relief to persons, such as Alessi claims to be, who have suffered from the neglect of counsel in pressing appeals. The circumstance that here an appeal was taken, although, as Alessi claims, without his knowledge, but was not prosecuted, does not entitle him to stand better than a defendant for whom no notice of appeal was filed. We therefore decline to reinstate the appeal.

As noted in *Del Vecchio, supra*, 556 F.2d at 111, the Seventh, Eighth and Tenth Circuits have ruled, relying on

the quotation in *Davis v. United States*, 417 U.S. 333, 346 (1974), from *Hill v. United States*, 368 U.S. 424, 428 (1962), that defects in taking guilty pleas warrant the grant of § 2255 relief only if there was "a fundamental defect which inherently results in a complete miscarriage of justice" and the case presents "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent."[2] The statements of these circuits reflect, as Judge Feinberg said for us in *Del Vecchio, supra*, 556 F.2d at 111, "the requirement that a defendant must at least show prejudice affecting the fairness of the proceedings or the voluntariness of the plea in order to succeed in a collateral attack based upon a Rule 11 violation." A conflict on this subject will doubtless be resolved as a result of the grant of certiorari, 47 U.S.L.W. 3449 (Jan. 8, 1979), to review *Timmreck v. United States*, 577 F.2d 372 (6 Cir. 1978). We will continue to follow *Del Vecchio* unless otherwise instructed.[3]

For purposes of disposition here it will not be necessary to consider all of Alessi's manifold criticisms of the allocution, many of which, even if well-founded, do not rise to the *Hill-Davis-Del Vecchio* level. We shall concentrate rather on two claims that come within that test. These are that Alessi did not understand the nature of the charges to which he was pleading guilty, *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *Henderson v. Morgan*, 426 U.S. 638, 645 (1976); *Irizarry v. United*

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2 The Fifth Circuit has recently reached the same conclusion in *Keel v. United States*, 585 F.2d 110, 113 (5 Cir. 1978) (en banc).

3 We have applied the *Hill-Davis* test in other contexts where only the violation of a federal statute was alleged. See *United States v. Sobell*, 314 F.2d 314, 321, *cert. denied*, 374 U.S. 857 (1963); *Alfano v. United States*, 555 F.2d 1128, 1130 (1977); *Edwards v. United States*, 564 F.2d 652, 654 (1977).

States, 508 F.2d 960, 964-65 (2 Cir. 1974), and that there were no factual bases for the pleas, *North Carolina v. Alford,* 400 U.S. 25, 38 & n.10 (1970); *U.S. ex rel. Dunn v. Casscles,* 494 F.2d 397, 399-400 (2 Cir. 1974).

We shall deal first with the plea to Count Eight of the tax indictment. After having quoted the charge and elicited that Alessi understood it and had told Ms. Rosner "the whole story about that," the judge went on as follows:

Q Did you have an income of approximately [$37,000] in 1971?
A Yes, I did, your Honor.
Q Did you file a tax return?
A Late, yes, your Honor.
Q When did you file it?
A I don't recall, but it was late, your Honor.
Q The return was due according to the indictment here on April 15, 1972.
A It was not filed at that time, your Honor.
Q You don't remember when it was filed?
A No, your Honor.

THE COURT: Do you have any knowledge of it?
MRS. ROSNER: I believe it was within a year thereafter, your Honor. 1973 or the early part of 1974.

Q Why didn't you file a tax return for the year 1971 which was due on or before April 15?

MRS. ROSNER: May I, for a moment, your Honor?

(Pause)

A In order to avoid payment of taxes, your Honor.

* * * *

Q So is it fair to say you knowingly sought to avoid paying the tax for the year 1971?
A Yes, your Honor.

Alessi contends that this failed to furnish him with an explanation of the nature of the offense defined in 26 U.S.C. § 7201,[4] as explicated with respect to its predecessor in *Spies v. United States*, 317 U.S. 492, 496-500 (1943). In that case, after elaborating on the various sanctions for non-payment of taxes—assessment of deficiencies, civil penalties of varying amounts, the misdemeanor of willful failure to file a return or pay a tax now defined in 26 U.S.C. § 7203, and "[t]he climax of this variety of sanctions . . . the serious and inclusive felony . . . of willful attempt in any manner to evade or defeat the tax," Mr. Justice Jackson addressed the question "whether there is a distinction between the acts necessary to make out the felony and those which may make out the misdemeanor." Unsurprisingly his answer was in the affirmative; "it would be unusual and we would not readily assume that Congress by the felony . . . meant no more than the same derelictions as it had just defined" as a misdemeanor, since felony was "the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency."

The Court then grappled with the problem of specifying just what the difference between the two crimes was, a

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4 Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

difference "not easy to detect or define." Mr. Justice Jackson found this "in the affirmative action implied from the term 'attempt,' as used in the felony subsection." By its use of this term "Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors." Without attempting a complete definition of what such "commissions" might be, the Court said this, 317 U.S. at 499:

> By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

While the colloquy would have been adequate if Alessi had been pleading to Count Seven, a misdemeanor count under § 7203, since his statement that he failed to file his 1971 tax returns "in order to avoid payment of taxes" would have showed the necessary element of willfulness, the mere paraphrasing of Count Eight of the indictment would hardly convey to a layman that the phrase "by concealing and attempting to conceal from all proper officers of the United States his true and correct taxable income" required the Government to prove concealment by something more than failing to file an income tax return. Even if we assume that the indictment was legally suffi-

cient, this does not eliminate the need for making sure the defendant understands it. Conceivably a hearing might show that in fact Ms. Rosner had given Alessi an explanation of *Spies* sufficient for the purpose, although we should think this possibility rather slim. But even if a hearing could provide an answer to the claim that Alessi was not properly advised what the Government would have to prove to convict him under § 7201, this would not answer the further claim of lack of factual basis for the plea. The Government does not suggest that at a hearing it could provide any evidence that Alessi concealed his 1971 income otherwise than by failing to file his income tax return. It says rather (Brief, p. 25):

> Alessi's admission that his failure to file his tax returns was the means by which he chose to evade his taxes for the year in question was, in this respect, sufficient, for purposes of a guilty plea, to satisfy Judge Bonsal that Alessi had committed the crime charged.

This simply flies in the face of *Spies*. We therefore direct the district court to vacate the conviction on the tax count and grant leave to replead.

The situation with respect to the narcotics charge is more complicated. The judge read the charge and elicited answers that Alessi understood it and had discussed the matter fully with Ms. Rosner. Then came the following:

Q What happened?

MRS. ROSNER: May I have a moment, your Honor? (Pause)

A I gave Mr. Manfredonia a kilo of heroin.

Q You gave Mr. Manfredonia a kilo of heroin. Where did you do that, sir, do you remember?
A In Queens, your Honor.
Q You gave it to him in Queens?
A Yes, your Honor.

MRS. ROSNER: I may add, your Honor, that the government's theory of this prosecution is one of aiding and abetting.

THE COURT: I understand that.

Q I take it at the time you gave this to Mr. Manfredonia, you knew that that package contained heroin, sir?
A Yes, I did.

The chief criticism of this is that, although the judge understood the meaning of "aiding and abetting," he did not explain it to Alessi.[5] The criticism is sought to be underscored by the claim that the Government would have had to prove that Alessi had given Manfredonia the heroin, knowing that the latter would distribute this, or possess it with an intent to distribute, in the Southern District of New York, not simply because of considerations of venue but to avoid the effect of the earlier plea bargain in the Eastern District, see 544 F.2d at 1152-54. Clearly it would have been desirable for the judge to have

5 The prosecutor evidently felt some qualms on this score. In answer to the judge's inquiry whether the Government had any other questions it would like him to ask, the prosecutor mentioned, "I take it Mr. Alessi understands the elements of the crime on which he is charged." When the judge answered that he thought he "went over that pretty thoroughly," the prosecutor said simply "[t]he distribution of the heroin" and went on to other matters. Prosecutors as well as defense counsel should display no hesitancy in calling the attention of trial judges to deficiencies in their administration of Rule 11.

explained this more fully and to have established that Alessi had in fact given the heroin to Manfredonia with a view to the latter's distributing it in the Southern District or possessing it with an intent to distribute there.

Here, however, in contrast to the tax count, there is some reason to believe that a hearing might develop both that Alessi had a full understanding of the charge and that there was a factual basis for the plea.[6] As indicated above, Alessi has had extensive experience with narcotics offenses, going back at least to 1972, and has been represented by astute counsel who have forcefully argued that, in light of the plea agreement to the 1972 Eastern District indictment, Alessi could be prosecuted, if at all, only for a crime committed by him in the Southern District rather than the Eastern District. The Government may well be able to develop evidence that Alessi was not at all ignorant of this and thus understood the narcotics charge to which he was pleading sufficiently that collateral relief should not be granted. With respect to factual basis, Judge Bonsal had presided over a ten-day trial of Alessi's co-defendants in the 1975 narcotics indictment, see *United States v. Panebianco*, 543 F.2d 447 (2 Cir. 1976) *cert. denied*, 429 U.S. 1103 (1977), in which Manfredonia was the Government's "most important witness," *id.* at 451. For all we know the record in that case may have given him ample reason for finding a factual basis for the plea; if not, the Government may now be able to demonstrate

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6 The defendant argues that *Irizarry v. United States*, *supra*, 508 F.2d at 964, 967-68 requires that the showing of both the defendant's understanding of the charges and the factual basis of the plea be set forth in the record. The question whether a violation of Rule 11 in those regards provides a basis for collateral relief in the absence of prejudice, however, was neither briefed nor discussed in the opinion. Cf. *Del Vecchio*, *supra*, 556 F.2d at 110.

this. We thus prefer not to pass upon Alessi's contentions of lack of understanding of the narcotics charge and of factual basis for his guilty plea to it until there has been an opportunity for further factual development.

Alessi challenges the validity of the guilty pleas on three other grounds. These are (1) alleged inadequacy in the court's advice that by pleading guilty he would waive his rights to confront the witnesses against him and not to incriminate himself; (2) that deficiencies in the advice in regard to special parole, particularly as to the minimum three-year term required by 21 U.S.C. § 841(b)(1)(A), brings him within the *Hill-Davis-Del Vecchio* standard; and (3) that his attorney had promised that if he pleaded guilty, he would receive concurrent sentences. The third point has been mooted by our vacating the conviction on the tax count, and we do not regard the deficiencies on the first as being so serious as to warrant relief under § 2255. On the other hand, we think it best that the hearing should embrace Alessi's understanding of his liability to special parole[7] and the effect of any misunderstanding on his plea to the narcotics charge.

The judgment is reversed with instructions to vacate the conviction on the tax count and to permit Alessi to replead, and to hold an evidentiary hearing with respect to the conviction on the narcotics count as directed in this opinion.

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7 He had received the mandatory three-year minimum special parole on his 1972 conspiracy conviction.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1260—September Term, 1979

(Argued June 3, 1980 Decided August 13, 1980)

Docket No. 79-2270

VIRGIL ALESSI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

B e f o r e :

TIMBERS, *Circuit Judge,*
MISHLER* and WILL**, *District Judges.*

Appeal from an order entered in the Southern District of New York, Dudley B. Bonsal, *District Judge,*

* Hon. Jacob Mishler, Senior Judge, United States District Court for the Eastern District of New York, sitting by designation.

** Hon. Hubert L. Will, Senior Judge, United States District Court for the Northern District of Illinois, sitting by designation.

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denying appellant's § 2255 motion to vacate judgment of conviction, after evidentiary hearing held pursuant to mandate of this Court.

Affirmed.

STEVEN B. DUKE, New Haven, Conn., *for petitioner-appellant.*

STEPHEN F. MARKSTEIN, Asst. U.S. Atty., New York, N.Y. (William M. Tendy, U.S. Atty., and Howard W. Goldstein, Asst. U.S. Atty., on the brief), *for respondent-appellee.*

TIMBERS, *Circuit Judge:*

This appeal calls upon us for the fifth time to address claims arising out of two indictments charging appellant with various federal narcotics and tax offenses, and appellant's guilty pleas thereto. *E.g., Alessi v. United States,* 593 F.2d 476 (2d Cir. 1979); *United States v. Alessi,* 544 F.2d 1139 (2 Cir.), *cert. denied,* 429 U.S. 960 (1976); *United States v. Alessi,* 536 F.2d 978 (2 Cir. 1976). Briefly, the instant appeal comes to us by the following route.

In November 1976 appellant withdrew previously entered pleas of not guilty to charges contained in the two indictments mentioned above, and—in satisfaction of all charges against him—pled guilty to one count of a Southern District narcotics indictment and one count of an Eastern District tax indictment. In January 1977 Judge Bonsal sentenced appellant to thirteen years

imprisonment on the narcotics count, to be followed by six years special parole; and two years imprisonment on the tax count.

In May 1978 appellant filed two motions pursuant to 28 U.S.C. § 2255 (1976) to vacate the judgments of conviction entered upon his guilty pleas. In these motions, appellant primarily claimed that he did not understand the nature of the charges to which he pled guilty and that there was no factual basis for his pleas. Appellants' motions were denied by Judge Bonsal and appellant appealed. On appeal, this Court upheld appellant's claims regarding the tax count. We therefore directed the district court to vacate appellant's conviction on the tax count and to grant appellant leave to replead to that count. With regard to the narcotics count, however, we concluded that "a hearing might develop both that Alessi had a full understanding of the charge and that there was a factual basis for the plea." 593 F.2d at 481 (footnote omitted). We therefore remanded the case to the district court so that an evidentiary hearing could be held with respect to appellant's claims that he lacked an understanding of the narcotics charge and that there was no factual basis for his guilty plea to that charge. We further directed that the hearing encompass appellant's claim that he lacked an understanding of his liability for special parole.

The evidentiary hearing mandated by this Court was held by Judge Bonsal in May 1979. At the conclusion of the hearing, Judge Bonsal concluded that appellant did in fact understand the charge to which he had pled guilty, that he understood his liability for special parole as a result of the plea, and that there existed a factual basis for the guilty plea on the narcotics count.

Appellant then took the instant appeal attacking these findings.

In view of the prior procedural history of this case—in particular, our most recent decision directing the district court to hold an evidentiary hearing on the validity of appellant's plea—the issue before us today is a relatively narrow one: namely, did the district court err in reaching the factual findings described above and in concluding that appellant was not entitled to have his conviction vacated pursuant to § 2255? We hold that there was no error.

At the outset, we note that much of the evidence presented to the district court consisted of witness testimony, including recollections of past events by appellant and his attorneys. Witness credibility, therefore, played a major role in the district court's findings. The court expressly found that appellant's testimony was lacking in credibility and was "tailored" to support his contentions. The court further found that the credible testimony at the hearing did not support appellant's claims. Courts must be wary of overturning findings based on such determinations of credibility. *E.g., Harned v. Henderson,* 588 F.2d 12, 23 (2 Cir. 1978). We find no reason to depart from that salutary rule in this case.

We believe that the evidence, both testimonial and non-testimonial, fully supports the district court's findings. Ordinarily, the burden of proof in this type of proceeding rests upon the petitioner. *Harned v. Henderson, supra,* 588 F.2d at 22. Even if the burden were on the government in this proceeding, as appellant contends, we would affirm.

With regard to the issue of appellant's understanding of the narcotics charge, Nancy Rosner—appellant's

attorney at the time of the plea—and other attorneys with whom appellant was in contact testified that they had several discussions with appellant concerning various aspects of the government's prosecution of appellant. Ms. Rosner further testified that she normally kept her clients informed of the nature of charges against them and the conduct of pretrial proceedings; it was also her practice to supply clients with copies of all papers filed on their behalf. Finally, despite appellant's claims to the contrary, appellant's own affidavit indicates that he in fact knew that he was being charged with distribution of narcotics in the Southern District of New York.

Evidence at the hearing also demonstrated that appellant understood his liability for special parole. Appellant had stated at an earlier plea allocution that he understood special parole. Furthermore, one of appellant's former attorneys testified that he had discussed special parole with appellant. Finally, considering appellant's own admission that Ms. Rosner had advised him under which statute he was going to plead guilty, it is reasonable to assume that she also informed him of the ramifications of pleading under that statute, including the effect of special parole.

Finally, the district court did not err in concluding that there was a factual basis for the guilty plea. Appellant's admission during the guilty plea allocution, the government's bill of particulars, the testimony of appellant's cohort, Manfredonia, during the trial of *United States v. Panebianco* (at which Judge Bonsal presided), and testimony by the Assistant United States Attorney who had been in charge of appellant's prosecution provided a sufficient factual basis for appellant's plea of guilty. This evidence established that

appellant had given narcotics to Manfredonia, knowing that the latter intended to take the narcotics to the Southern District for distribution.

We have carefully considered all of appellant's remaining claims, including the claims that he was denied effective assistance of counsel, that he had not been informed of his fifth and sixth amendment rights, that this Court's earlier decision to vacate appellant's tax conviction automatically invalidated his narcotics conviction, and that the evidentiary hearing was unfair. Although there is substantial doubt that any of these issues are in fact properly before us, we have examined appellant's arguments in support of these claims, and we hold the claims to be without merit.

We find no error in the findings of fact and conclusions of law made by the district court. We affirm the order of the district court denying appellant's § 2255 motion.

Affirmed.

Will, J. concurring

While I concur in the decision to affirm the district court's denial of appellant's § 2255 motion, I do so only because a prior distinguished panel of this court, in remanding the case to the district court for a hearing, enunciated two principles with respect to the requirements of Rule 11 of the Federal Rules of Criminal Procedure which I accept as the law of this case but which are novel and, I believe, raise important questions with respect to the taking of valid guilty pleas. *Alessi v. United States,* 593 F.2d 476 (1979).

The first of these relates to whether or not Rule 11 requires that the court taking the guilty plea determine

on the record at the time of taking the plea, among other facts, (1) that the defendant understands the nature and essential elements of the crime to which he is pleading; and, (2) that there is a factual basis for the plea. It has always been my understanding that it does and that all the essential substantive requirements of Rule 11 must be satisfied in open court at the time of taking a guilty plea.[1] As the Supreme Court has said, "Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding . . . ." *McCarthy v. United States,* 394 U.S. 459, 468 (1969).

Accordingly, the holding of an evidentiary hearing on a § 2255 motion to determine whether the defendant may have understood the nature and essential elements of the crime to which he pleaded and whether there may have been a factual basis for the plea when the record of the taking of the plea is insufficient to establish either is, I believe, inconsistent with the purposes of Rule 11.

Moreover, as the evidentiary hearing in this case demonstrated, it is an unsatisfactory way in which to determine if the defendant understood what he was pleading to, if there was a factual basis for his plea, or if the other essential Rule 11 requirements were met. While, at the conclusion of the instant hearing, the trial judge found that the defendant had understood the nature and essential elements of the crime of aiding and abetting the sale of heroin or the possession of heroin with the intent to sell it in the Southern District of New York, the seven days of testimony by seven

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1 This is not to say that a formal but not substantive violation of Rule 11 will justify § 2255 collateral relief. *See Hill v. United States,* 368 U.S. 424 (1962); *United States v. Timmreck,* 441 U.S. 780 (1979); *Del Vecchio v. United States,* 556 F.2d 106 (2d Cir. 1977).

witnesses, including the defendant, several former counsel, prosecutors, etc., is far from unequivocal. And, as the earlier opinion of this Court pointed out, the discussion at the time of taking the plea involved no reference to the essential elements of aiding and abetting such a sale or possession in the Southern District of New York, but rather dealt with the defendant delivering a kilo of heroin to a man named Manfredonia in Queens, which is part of the Eastern District of New York.

Not only was there no discussion of the essential elements of aiding and abetting a sale or possession, particularly in the Southern District, but the only possible factual basis for the plea at that hearing is the same testimony about delivery of heroin in Queens. Which leads to the second, I believe, novel concept, i.e., that if the judge taking the plea believes from other information available to him but not presented at the plea-taking that there is a factual basis for the plea, the requirement of Rule 11 is satisfied.

In the instant case, the earlier opinion of this Court suggested that, since the judge taking the guilty plea had presided over a trial of Manfredonia and others (but not Alessi) on charges of selling or possessing heroin with intent to sell in the Southern District, that experience "may have given him ample reason for finding a factual basis for the plea; if not, the Government may now be able to demonstrate this." *Alessi v. United States, supra* at 481. On remand, the district judge found that his prior trial experience together with evidence presented at the subsequent evidentiary hearing did give him a factual basis for accepting the plea.

I have great difficulty with the concept that information obtained by the judge taking the plea outside of the plea proceeding which is not known to the defendant so that he can confirm or deny it and which is not made part of the record so that it can be reviewed as to whether or not it constitutes an adequate factual basis can satisfy Rule 11. Apparently, the information could come from any source, newspapers, news magazines, radio, television, a presentence investigation report, grand jury transcripts, etc., without any disclosure to the defendant of what facts the judge considers establish the factual basis or from where they were obtained. While this court has previously held that a district court, in determining whether or not there was a factual basis for a plea, is "free to rely on any facts at its disposal—not just the admissions of the defendant", it is clear that the court was referring to information obtained by "inquiry of the defendant or the attorney for the government, or by examining the presentence report or otherwise . . . ." *Irizarry v. United States*, 508 F.2d 960, 967 (2d Cir. 1974).

But the *Irizarry* court went on to say,

> However, the fact that the court may refer to additional material does not answer Irizarry's objection that this material was not made a part of the record of the proceedings at which the plea was entered. Any additional facts on which the court relies in determining that there is a factual basis for the plea must be put into the record at the time of the plea. See Manley v. United States, 423 F.2d 1241 (2d Cir. 1970) (*en banc*).

Id. at 967 (footnote omitted).

With respect to post-*McCarthy* pleas, the *Irizarry* court pointed out that *Manley, supra,* at 1244, explicitly held that the judge taking a guilty plea "must demonstrate on the record that he has satisfied himself that there is a factual basis for the plea." The court then quoted from *Santobello v. New York,* 404 U.S. 257, 261 (1971) as follows:

> Fed.Rule Crim. Proc. 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, *on the record,* the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge.

(Footnote omitted; emphasis in original). *Post hoc* explanations, such as the one attempted in this case, are insufficient.

Irizarry, supra at 968.

In language which is particularly appropriate to this case, the *Irizarry* court concluded:

> We reverse this judgment of conviction not without regret. Irizarry was most likely guilty of something, and he knew most likely that he was guilty of something . . . However, the reversal is necessary to comply with the admonition in *McCarthy, supra,* 394 U.S. at 472, 89 S.Ct. at 1174, 22 L.Ed.2d 418,
>
> > It is . . . not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

Id. at 968.

Alessi is admittedly a criminal. He was sentenced to thirteen years' imprisonment plus six years special parole on the guilty plea here in question. His plea proceedings, however, were clearly insufficient to meet the requirements of Rule 11, both with respect to whether he understood the nature and essential elements of the crime to which he was pleading and whether there was a factual basis for the plea. Upon remand for an evidentiary hearing as ordered by this court, seven witnesses testified over a period of seven days. The judge who took the plea and conducted the evidentiary hearing concluded from all the testimony that the defendant had understood the nature and essential elements of the charge of aiding and abetting sales of or possession with intent to sell narcotics in the Southern District of New York although the record of the plea-taking did not demonstrate it and the defendant denied at the hearing that he had. The judge also concluded that there was a factual basis for the plea, in part based on testimony at the hearing and in part based on information he secured presiding over an earlier, related trial.

As indicated at the outset of these observations, if compliance with the basic substantive requirements of Rule 11, such as that the court be satisfied at the plea taking that the defendant fully understands the nature and essential elements of the crime to which he is pleading, can be established by a later fact-finding hearing and, if the factual basis for a guilty plea can rest on knowledge acquired by the court outside the plea proceedings and not disclosed to the defendant or on the record of the plea proceedings or on evidence adduced at a subsequent hearing as this court held in remanding the case for an evidentiary hearing, then I

am compelled to concur in affirming the district court's denial of Alessi's § 2255 motion. Obviously, however, I have serious doubts as to whether that procedure is contemplated by Rule 11 since it is contrary to decisions both of the United States Supreme Court and of this court such as *McCarthy v. United States, supra; Santobello v. New York, supra; Manley v. United States, supra;* and *Irizarry v. United States, supra.*

APPENDIX C

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of August, one thousand nine hundred and eighty.

Present:
HON. WILLIAM H. TIMBERS, C.J.
HON. JACOB MISHLER, D.J.
HON. HUBERT L. WILL, D.J.
Circuit Judges.

Virgil Alessi,
Petitioner-Appellant
v.
United States of America,
Respondent-Appellee
79-2270

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk
By: Rolanne Henry
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of October, one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. TIMBERS,
Circuit Judge,
HON. JACOB MISHLER,
HON. HUBERT L. WILL,
District Judges.

VIRGIL ALESSI,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

Docket No. 79-2270

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL CLERK
Clerk

by Rolanne Henry
Deputy Clerk